BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DON G. CAIN Claimant	)	
VS.	)	
RILEY CONSTRUCTION CO. Respondent	)	Docket No. 1,028,064
AND	)	
BUILDERS ASSN. SELF-INS. FUND Insurance Carrier	)	

ORDER

Claimant requests review of the May 25, 2006 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

The Administrative Law Judge (ALJ) found the claimant's accidental injury did not arise out of and in the course of employment; timely notice was not provided and just cause was not established for failure to provide timely notice; and written claim was not timely.

The claimant requested review of the following: (1) whether his accidental injury arose out of and in the course of employment; (2) whether timely notice was given within 10 days; and, if not (3) whether just cause was shown for failure to give timely notice. In his brief to the Board the claimant additionally argued that written claim was timely.

Respondent argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The claimant alleged he suffered a series of repetitive injuries while working for respondent from June 1, 2002 through October 15, 2005.[1] The evidentiary record establishes that claimant's last day worked with respondent was August 1, 2005.

Before he began his employment with respondent the claimant had suffered a work-related injury to his back in approximately 1985. Claimant had filed a workers compensation claim for that injury and was provided medical treatment. After that injury the claimant continued to receive periodic medical treatment for his low back primarily consisting of chiropractic care.

Claimant began working as a carpenter for the respondent in 1993. The respondent's owner, Lonnie Pacquette, noted that claimant had intermittent problems with his back from when he started working for respondent and that claimant related the problems to his previous workers compensation injury.

The claimant noted that in 2002 his back pain worsened to the point that he sought medical treatment with his own physician. Dr. Peck referred the claimant to Dr. Richard Baker, a surgeon. Dr. Baker's medical record indicated the claimant related his problem back to the 1980's when he had a work-related injury and noted he had recurrent symptoms ever since.[2] After a series of epidural steroid injections the claimant underwent surgery consisting of a laminectomy at L4-5 on February 28, 2003. The claimant testified:

> Q. Do you know what type of surgery you got?
>
> A. A laminectomy.
>
> Q. And did you ever turn it in as work comp at that time?
>
> A. No, I didn't.
>
> Q. Did you ever file a formal claim?
>
> A. No.[3]

The claimant collected unemployment benefits while he was off work for three months after his back surgery. He returned to light-duty work for the respondent in 2003. By 2004 the claimant had returned to his regular work in construction. Claimant testified as he continued to work from 2004 to 2005 his back pain progressed. He further

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[1] E-1 Application for Hearing filed March 21, 2006.

[2] P.H. Trans., Resp. Ex. A.

[3] *Id*. at 11.

recounted an incident at work when he fell while pushing a wheelbarrow at respondent's daughter's house. Mr. Pacquette was aware claimant had tripped but noted claimant never alleged the incident hurt him. Claimant agreed that the incident did not immediately cause him pain and he did not tell Mr. Pacquette he had hurt his back.

As previously noted, claimant's last day at work was August 1, 2005. Claimant stated that he quit work because he was in such pain from his low back that he could not continue working. But when he left work claimant never indicated that he wanted to file a worker's compensation claim against respondent and further indicated that he thought his ongoing low back problems were related to his 1985 injury.

The claimant agreed that until his attorney sent a letter to respondent dated March 20, 2006, he had not told anyone that he believed his back problem was related to his employment with respondent. Claimant testified:

> Q. Now, my question is, specifically, was your attorney's letter of March 20 and the signing of your application on March 20, the first date that you specifically told anyone at Riley that you believed your back problem to be related to that employment?
>
> A. Yes.[4]

Moreover, the contemporaneous medical records did not contain any reference to the alleged trip and fall while using the wheelbarrow.

The dispositive issue is whether the claimant gave timely written claim. Claimant alleged a series of work-related accidents from June 1, 2002 through October 15, 2005. As noted, claimant's last day worked was August 1, 2005, and for the purpose of determining whether claimant's written claim was timely served, claimant's accident date will be treated as August 1, 2005.

K.S.A. 44-520a(a) provides for written claim to be served within 200 days of the accident date. Under certain circumstances, the time period for serving written claim upon the employer may be extended to one year. K.S.A. 44-557(a) requires every employer to report accidents of which it has knowledge within 28 days of receiving such knowledge. Subsection (c) of K.S.A. 44-557 provides:

> No limitation of time in the workers compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be

[4] Cain Depo. at 30.

> commenced by serving upon the employer a written claim pursuant to K.S.A. 44-520a and amendments thereto within one year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto.

The parties agreed that written claim was provided respondent on March 21, 2006. Written claim was served more than 200 days but less than one year from claimant's date of accident. Claimant argues that he gave timely notice of accident and respondent failed to file a report of accident with the Division of Workers Compensation. Accordingly, claimant contends the time for serving written claim was extended by K.S.A. 44-557 to one year.

Respondent argues that because claimant was not incapacitated by the alleged accident, it was not required to file a report of accident and the provisions for extending the time for serving written claim are not applicable.

The Board agrees that claimant has not met his burden of proving that respondent was required to file an accident report and failed to do so. K.S.A. 44-557(a) provides:

> It is hereby made the duty of every employer to make or cause to be made a report to the director of any accident, or claimed or alleged accident, to any employee which occurs in the course of the employee's employment and of which the employer or the employer's supervisor has knowledge, which report shall be made upon a form to be prepared by the director, within 28 days, after the receipt of such knowledge, if the personal injuries which are sustained by such accidents, are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.

The record does not establish that respondent had knowledge claimant had suffered a work-related accident. Claimant neither reported an accident nor requested medical treatment from respondent. As respondent did not have notice of a work-related accident it could not be expected to file an employer's report of accident at that time.

The employer was not required to file a report of accident with the Director and the provisions of K.S.A. 44-557(c) do not apply to this claim. Accordingly, the provisions of K.S.A. 44-557(c) extending the time period for serving written claim cannot be utilized. Claimant failed to serve written claim within 200 days as required by K.S.A. 44-520a, and his claim is, therefore, time-barred.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Bryce D. Benedict dated May 25, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2006.

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier